



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachment**

Enwave Energy Corporation – Contractual Issues

Date:	August 10, 2010
To:	Executive Committee
From:	City Manager
Wards:	All
Reason for Confidential Information:	This report involves the security of property belonging to the City or one of its agencies, boards, and commissions.
Reference Number:	

SUMMARY

The purpose of this report is to obtain Council authority to resolve certain contractual issues between the City and Enwave Energy Corporation ("Enwave") including matters related to the Deep Lake Water Cooling Project (the "DLWC Project") and the Energy Transfer Agreement dated January 18, 2002 between the City and Enwave, as amended (the "ETA"). For this purpose, Council authority is sought to: (a) enter into a second Amending Agreement to the ETA with Enwave (b) provide a Consent and Acknowledgement to Integrated Private Debt Corp., or its affiliate ("IPDC"), regarding Enwave's proposed assignment of its interest in the ETA to IPDC, as collateral security for a new credit facility being negotiated between Enwave and IPDC; and, (c) enter into a Municipal Access Agreement with Enwave, all in accordance with the confidential terms and conditions contained in Confidential Attachment 1 of this report.

RECOMMENDATIONS

The City Manager recommends that:

1. Council authorize the General Manager, Toronto Water to enter into and execute an agreement (the "Second Amending Agreement") to further amend the Energy Transfer Agreement between the City and Enwave Energy Corporation dated January 18, 2002, as amended by agreement dated August 20, 2007, substantially

- on the confidential terms and conditions attached in Appendix "A" to Confidential Attachment 1 of this report and such other terms and conditions as are satisfactory to the City Manager, in consultation with the Deputy City Manager and Chief Financial Officer, the General Manager, Toronto Water and the City Solicitor and in a form satisfactory to the City Solicitor.
2. Council authorize the Deputy City Manager and Chief Financial Officer to enter into, execute and deliver a consent and acknowledgement (the "Consent and Acknowledgement") to Integrated Private Debt Corp., or any affiliate of Integrated Private Debt Corp. ("IPDC"), whereby the City consents to Enwave assigning its interest in the Energy Transfer Agreement dated January 18, 2002 between the City and Enwave, as amended, (the "ETA") to IPDC as collateral security for a new credit facility being negotiated between Enwave and IPDC; provided, however, that the terms and conditions of the Consent and Acknowledgement, and any related documents in which the City has an interest, are satisfactory to the Deputy City Manager and Chief Financial Officer and the City Solicitor and in a form satisfactory to the City Solicitor;
 3. Council authorize the Deputy City Manager and Chief Financial Officer to deliver and execute, if necessary, on behalf of the City, any additional documents that the Deputy City Manager and Chief Financial Officer and the City Solicitor determine are necessary to give effect to Recommendation 2. above.
 4. Council authorize the City to enter into a Municipal Access Agreement with Enwave Energy Corporation ("Enwave") to permit Enwave to use the City's public highways for its district energy operations in City public highways, substantially on the confidential terms and conditions attached in Appendix "B" to Confidential Attachment 1 of this report and such other terms and conditions as are satisfactory to the City Manager, in consultation with the Deputy City Manager and Chief Financial Officer, the General Manager, Transportation Services and the City Solicitor and in a form satisfactory to the City Solicitor.
 5. The information contained in Confidential Attachment 1 of this report remain confidential in its entirety.

FINANCIAL IMPACT

The confidential financial impacts are discussed in Confidential Attachment 1 of this report.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

Enwave

At its meeting of July 28, 29, 30, 1999, Council approved the confidential report regarding the restructuring of the Toronto District Heating Corporation (TDHC) as a share capital corporation under the Ontario Business Corporations Act, with BPC Penco Corporation (a subsidiary of OMERS) and the City as shareholders in the corporation. The name of the corporation was subsequently changed to Enwave Energy Corporation ("Enwave").

DLWC Project and the ETA

In September 1997, Councils of both the former City of Toronto and Metro Toronto approved a concept plan proposed by Enwave to develop a district cooling system using Deep Lake Water Cooling technology and a piping distribution network in the downtown core.

At its meeting of July 24, 25 and 26, 2001, in adopting Report No. 12, Clause 1 of the Works Committee, Council authorized the execution by the City of the ETA on specified terms and conditions.

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/2001/agendas/council/cc010724/wks12rpt/cl001.pdf>

City Council, at its meeting of September 25, 26 and 27, 2006, authorized an Amending Agreement to the ETA for the replacement of Enwave's contractual obligation to provide back-up power supply by way of diesel generation at the John Street Pumping Station with steam driven turbine generation from Enwave's Simcoe Street Cooling Plant, together with such associated technical amendments as required by the General Manager, Toronto Water, subject to certain express conditions.

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/2006/agendas/council/cc060925/pof7rpt/cl058.pdf>

Performance Bond for the DLWC Project

At its meeting of October 1, 2, 3, 2002, Council approved performance bonding of \$19.4 million, as required under the ETA for the work required to complete the DLWC Project. Enwave's insurance broker required the provision of 100% collateral to secure the bonding. Therefore, Council also authorized the City's Chief Financial Officer and Treasurer to provide an irrevocable letter of credit of up to \$7.3 million as collateral in support of Enwave with the remaining \$12.1 million to be provided by Borealis. On

November 22, 2002, the City obtained a letter of credit with the Royal Bank of Canada in the amount of \$7.3 million with Enwave's insurer named as the beneficiary.

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/2002/agendas/council/cc021001/pof13rpt/cl004.pdf>

At its meeting of April 12, 13 and 14, 2005, in adopting the Consolidated Clause in Works Committee Report No. 3, Council, among other things, permitted Enwave to substitute for the \$19.4 million performance bond it provided to the City in 2002 in relation to the ETA for the DLWC Project, a performance bond in the reduced amount of \$6.5 million, corresponding to the City's estimated risk exposure at that time, assuming no cost overruns (the "Performance Bond"). The City's letter of credit was reduced proportionally to \$2.795 million on November 8, 2005 (the "Letter of Credit").

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/2005/agendas/council/cc050412/wks3rpt/cl007.pdf>

Municipal Access Agreement

In September 1997, Council of the former City of Toronto adopted the recommendation that Enwave (then TDHC) enter into a Municipal Access Agreement with the City on terms and conditions to be approved by City Council, including the payment of compensation for the use of the City's road allowance.

Subsection 9(4) of the *Toronto District Heating Corporation Act, 1998* requires the company to enter into municipal agreements for the continuing and future use of any highway, public lane, or public communication within the City of Toronto, the terms of which shall include compensation to be paid to the municipality.

Subsequently, in October 1998, City Council again directed that Enwave be requested to enter into a Municipal Access Agreement with the City for the purpose of district cooling and district heating distribution pipes, and that Enwave be required to pay rent for the use of City road allowances.

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/1998/agendas/council/cc/cc981001/sp18rpt/cl017.htm>

Additional confidential decision history is addressed in Confidential Attachment 1 of this report.

ISSUE BACKGROUND

The ETA was executed on January 18, 2002 and, subsequently, amended on August 20, 2007. The ETA governs the relationship between the City and Enwave as it relates to the DLWC Project. Over the years, certain contractual issues have arisen regarding the DLWC Project which require resolution and which are detailed in Confidential Attachment 1 to this report. Subject to Council approval, the purpose of the proposed Second Amending Agreement, the Consent and Acknowledgement and the Municipal Access Agreement is to resolve these contractual issues on the basis of the terms and conditions set out in Confidential Attachment 1 of this report. As the ETA contains a confidentiality provision, whereby the parties agreed to keep the terms and conditions of the ETA and all related agreements confidential, the proposed agreement terms are contained in the confidential Attachment.

COMMENTS

The confidential comments are discussed in Confidential Attachment 1 of this report.

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SIGNATURE

Joseph P. Pennachetti
City Manager

ATTACHMENTS

Confidential Attachment 1 – Enwave Energy Corporation – Contractual Issues